No. 83-6312

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MICHAEL C. ANTONELLI, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in order to protect privacy rights under the Freedom of Information Act, the Federal Bureau of Investigation may refuse to confirm or deny the existence of files pertaining to third parties, absent their consent or any discernible public interest in disclosure of the requested information.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 721 F.2d 615. The opinions of the district court (Pet. App. B1-B10, C1-C7) are reported at 536 F. Supp. 568 and 553 F. Supp. 19.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1983. The petition for a writ of certiorari was filed on February 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Michael C. Antonelli is currently incarcerated in a federal penitentiary on conviction for bank fraud. He has submitted numerous Freedom of Information Act (FOIA) requests to the Federal Bureau of Investigation to obtain access to his own files and the files of a number of other individuals. The FBI has produced "literally thousands of pages" of records in response to his requests (Pet. App. B9). The

Bureau declined, however, either to confirm or deny the existence of any files pertaining to eight individuals, who petitioner believes may have played a role in his apprehension and conviction. 1/ Petitioner was informed that in handling requests for information concerning third persons, 2/ the FBI considers itself to be governed by the Privacy Act, 5 U.S.C. 552a(2)(b), which generally prohibits the release of personal information concerning a living person without that person's written authorization, unless such disclosure is required under the FOIA. 3/ Since in the instant case petitioner did not produce written authorizations by the eight named individuals or assert any identifiable public interest in disclosure, the FBI declined to confirm or deny the existence of records concerning them. The

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1/ Those individuals are Peter James Gushi, Raymond Theodore Bottari, Calogero Joseph Ravana, William Anthony Marzano, James Lawrence Dvornick, Roy Robert Bridges, John Rocco Cartolino, and Assistant United States Attorney G. Roger Markley.

2/ A request by an individual for his own records is commonly referred to as a "first party request." A request by an individual for another person's records is known as a "third party request."

3/ 5 U.S.C. 552a(b) provides in pertinent part:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless disclosure of the record would be --
>
> * * * * *
>
> (2) required under section 552 of this title; * * *

FBI relied on FOIA Exemptions 6, 7(C), and 7(D) (5 U.S.C. 552(b)(6), (7)(C), 7(D)). 4/

2. Petitioner filed suit in the United States District Court for the Northern District of Illinois following the denial of his FOIA request. The Bureau moved for summary judgment as to records concerning the eight individuals. In support of its motion, the Bureau offered an affidavit by FBI Special Agent Donald L. Smith. Agent Smith explained that "[t]he mere affirmation that an individual was the subject of an FBI investigation would in itself be a clearly unwarranted invasion of that individual's privacy" (Aff. ¶74). Similarly, the affirmation that a person has been cooperating with the FBI, perhaps as a witness or informant, would also be an unwarranted invasion of his privacy because it might cause the individual to be subjected to embarrassment, harassment, or physical harm (Aff. ¶77). 5/ If a personnel, medical, or similar file is maintained

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4/ 5 U.S.C. 552(b) provides in pertinent part:

> This section does not apply to matters that are --
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
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> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source * * *.

The FBI first asserted coverage under Exemption 7(D) in district court.

5/ The FOIA offers greater protection to information that would disclose the identity of a confidential source than to information that would invade a person's privacy, because withholding under Exemption 7(D), unlike withholding under Exemption 7(C), does not entail a balancing test. Nonetheless, for purposes of the FBI policy at issue here, the former category receives the same treatment as the latter. Smith Aff. ¶¶77-78.

on an individual whose records are sought, the affirmation that such a file exists is unlikely to be as serious an intrusion into the privacy of the individual, but it could be an unwelcome and unwarranted intrusion nonetheless (Aff. ¶75). Therefore, where a requester does not identify even a minimal public interest in disclosure that could outweigh the privacy interests of a third party whose records he seeks, the Bureau protects the individual's privacy unless he waives disclosure (Aff. ¶76). 6/

The district court denied the Bureau's motion for summary judgment and ordered it either to produce the requested documents or to supply affidavits justifying exemption, in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) (Pet. App. B7-B8). 7/ The court subsequently stayed its order (Pet. App. C7) and certified its decision for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

3. The court of appeals granted the Bureau's motion for an interlocutory appeal and unanimously reversed the district court's decision with instructions to grant summary judgment in favor of the Bureau (Pet. App. A2). The court held that the challenged FBI procedures "are adequate for denying nonconsensual third party requests where the third party shows no identifiable public interest in disclosure" (Pet. App. A5). The court observed that "[i]mposing additional burdens on the FBI could hamper agency investigations or invade personal privacy" (ibid.) and reasoned that the Vaughn affidavit procedures are inappropriate for handling requests where the mere acknowledgment

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6/ Petitioner questions the consistency of the FBI's adherence to this policy on the ground that the FBI has released some records pertaining to three of the eight persons named above (Pet. 4 n.*). However, those records were produced in connection with the records of other persons who had consented in writing to the disclosure of their files. The information was released only after a determination that it was innocuous, was already known to petitioner, or was in the public domain. The FBI did not search for the records of any of those eight persons by their names.

7/ The procedures prescribed in Vaughn were approved in pertinent respects for use in the Seventh Circuit in Stein v. Department of Justice, 662 F.2d 1245, 1253 (7th Cir. 1981).

that certain files are maintained could jeopardize privacy interests (Pet. App. A3).

The court of appeals rejected petitioner's contention that dispensing with the filing of Vaughn affidavits in cases such as this would grant the FBI a "blanket exemption" from the FOIA that Congress had not intended (Pet. App. A5). It stated (ibid.):

> The agency still must meet its threshold burden of showing why the requested information is exempt from disclosure. Under the circumstances here, the Smith affidavit meets that burden.

The court also rejected petitioner's contention that his interest in "ensuring that his convictions were not obtained as a result of a violation of the Constitution" was a "genuine public interest" to be balanced against the privacy interests of the third parties whose records were sought. Pet. App. A5, citing Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981). 8/

ARGUMENT

1.a. This case involves the responsibilities of the FBI under the Privacy and Freedom of Information Acts when confronted with a request for records identified as pertaining to persons other than the requester, where those persons have not provided written consent to disclosure. Such records, if they exist, would be found in personnel and medical or similar files, or in investigatory files. 9/ Under the Privacy Act, the records could not lawfully be disclosed unless disclosure was required under the FOIA (5 U.S.C. 552a(b)(2)); and under the FOIA, disclosure

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8/ This Court recently reaffirmed in United States v. Weber Aircraft Corp., No. 82-1616 (Mar. 20, 1984), slip op. 9, that the FOIA was not intended to be used for discovery purposes.

9/ For reasons explained below, the issue here would not arise if the request were by subject, or by some other classification other than name -- even though the same records might be involved. Nor does the problem arise in connection with requests by a person for records pertaining to himself ("first party requests"). This case does not, therefore, involve the question presented in Department of Justice v. Provenzano, No. 83-1045, cert. granted (Apr. 2, 1984), and Shapiro v. DEA, No. 83-5878, cert. granted (Apr. 2, 1984).

would not be required if it would "constitute a clearly unwarranted invasion of personal privacy" or "disclose the identity of a confidential source."

The FBI has concluded, and the court of appeals has agreed, that the mere disclosure of whether FBI files exist on a third party is, to some significant degree, an invasion of personal privacy or betrayal of identity as a source. See Affidavit of Donald L. Smith. If a prisoner suspects that "John Smith" tipped the FBI off to his criminal activities, the mere fact that the FBI maintains a file on "John Smith" may be enough to convince the prisoner of his suspicions -- especially if the FBI is further required to assert Exemption 7(D) of the FOIA. To withhold "Smith's" records would be of little comfort then. As the court of appeals observed (Pet. App. A4):

> Merely confirming that a particular file exists and stating the applicable exemption could reveal too much information where the requester seeks access to another person's files. For example, if the FBI denies a request for a specific third party's records on the ground that disclosure might reveal a confidential source (Exemption 7(D)), this denial itself may give the requester enough information to expose the subject of the inquiry to harassment and actual danger.

Similarly, "revealing that a third party has been the subject of FBI investigations is likely to constitute an invasion of that person's privacy," as the court of appeals recognized. Pet. App. A4; see Aff. ¶74. Rushford v. Civiletti, 485 F. Supp. 477 (D. D.C. 1980), aff'd, 656 F.2d 900 (D.C. Cir. 1981), is a striking illustration. There, a plaintiff requested FBI files relating to criminal investigations of federal judges that had not resulted in the bringing of charges. The district court correctly held that development of a factual record, such as that demanded by petitioner here, would be "unnecessary and inappropriate" because the mere disclosure "that the Department of Justice is maintaining files on complaints of judicial misconduct" would likely be "embarrassing for the individuals involved, both in their personal and professional capacities."

485 F. Supp. at 480-481. 10/ The principle is the same here -- even though the magnitude of the invasion of privacy with respect to other third parties may not be as great as that with federal judges (see id. at 479).

It is therefore evident that confirmation of the existence vel non of FBI files on nonconsenting third parties, and preparation of a Vaughn index specifying the nature of the FOIA exemption claimed with respect to each, would constitute an invasion of privacy or betrayal of a confidential source. 11/ That, of course, does not conclude the analysis. Under Exemptions 6 and 7(C), records may be withheld only if the invasion of personal privacy caused by the disclosure would be "clearly unwarranted." 5 U.S.C. 552(b)(6), (7)(C). This determination ordinarily requires a "balancing of private against public interests." Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982), citing S. Rep. 813, 89th Cong., 1st Sess. 9 (1965); see also Department of Air Force v. Rose, 425 U.S. 352, 372 (1976). Here, however, no balancing is required -- or even possible -- because petitioner has asserted absolutely no public interest in disclosure of information on the eight persons involved. Pet. App. A5. 12/ There is, in the court of appeals' words (ibid.), no "viable public interest against which the court

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10/ The procedural context of Rushford is distinguishable from that here, because in Rushford the FOIA plaintiff did not make his request by name. But the same conclusion would surely have been reached if, as here, the requester had asked for access to the complaint investigation files, if any, with respect to "Judge Smith" and other individual named judges.

11/ From the context of petitioner's request, it seems likely that the requested files are investigatory files, rather than personnel, medical, or similar files. Even with respect to the latter types of information, however, the disclosure of an FBI file might well be an unwelcome and unwarranted intrusion. Aff. ¶75.

12/ Petitioner does not challenge the court of appeals' conclusion (Pet. App. A5) that he "failed to identify any viable public interest" in disclosure. Indeed, his argument rests entirely on the effect of the decision below on "citizens having merely private, as opposed to public, interests in obtaining the information" (Pet. 8, 12).

could weigh the privacy and agency interests at stake." 13/ Accordingly, the FBI is required to protect the Privacy Act rights of the nonconsenting persons whose files petitioner seeks. Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981). The FBI's policy of refusing to confirm or deny the existence of files on nonconsenting third parties, upheld by the court below, represents a "workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." FTC v. Grolier, No. 83-372 (June 6, 1983), slip op. 8; EPA v. Mink, 410 U.S. 73, 80 (1972). 14/

b. Petitioner nevertheless contends, citing 5 U.S.C. 552(a)(4)(B), that the court of appeals' decision is erroneous because it "contravenes the statute's explicit requirement that the district court conduct a de novo review to determine whether an agency's withholding of information is justified and that the agency bear the burden of sustaining its withholding of information" (Pet. 8). There is no merit to this contention. The court of appeals reviewed the Bureau's action in withholding information pertaining to the third parties named in petitioner's complaint and held that by submitting the Smith affidavit the Bureau had met the burden of showing why such information was, at least as a threshold matter, exempt from disclosure (Pet. App. A-5). This approach is in accord with well-established FOIA

13/ Petitioner's extended discussion of the congressional policy of disclosure to "any person" without regard to the reasons he may have for wanting the information (Pet. 11-13) has no application to investigative files or personnel, medical, or similar records the disclosure of which would invade personal privacy. With respect to such files, the public interest in disclosure, if any, must be identified and balanced against the privacy interests involved. Washington Post Co., 456 U.S. at 599.

14/ The courts in parallel contexts have often upheld an agency's right or responsibility to refuse to confirm or deny the existence of sensitive files where the mere disclosure of their existence might entail adverse consequences. See Miller v. Casey, No. 83-1108 (D.C. Cir. March 16, 1984); Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Cf. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 146 (1981).

procedures. As the District of Columbia Circuit recently observed in Miller v. Casey, No. 83-1108 (March 16, 1984), slip op. 7 (citations deleted):

> Summary judgment is warranted on the basis of agency affidavits when the affidavits describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."

See also Miller v. Bell, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982). Petitioner has not shown any countervailing public interest in disclosure that might outweigh the privacy interests of the named third parties. Accordingly, no further inquiry was needed; the FOIA's requirement of de novo review was satisfied. See Pet. App. A5.

Petitioner's argument (Pet. 13) that in 1981 Congress considered but did not enact certain proposed amendments to Exemption 7 that would have strengthened the FBI's ability to protect its investigatory functions is beside the point. Congress's failure to act did not represent a rejection of the principle that the FBI must be capable of protecting sensitive information in its files, nor does it limit the power of the courts to construe Exemption 7 to accomplish this end. See United States v. Weber Aircraft Corp., No. 82-1616 (Mar. 20, 1984), slip op. 11 n.25. The court of appeals correctly concluded from the legislative history of the 1976 amendments (Pet. App. A4-A5) that the existing Exemption 7 was intended "to preserve every conceivable reason the Bureau might have for resisting disclosure of material in an investigative file" (120

Cong. Rec. 17040 (1974) (remarks of Sen. Hart)) so as to protect the Bureau's ability to carry out its functions. 15/

2. Petitioner's claim (Pet. 8-10) that the decision below conflicts with Lame v. United States, 654 F.2d 917 (1981), and Diamond v. FBI, 707 F.2d 75 (1983), cert. denied, No. 83-258 (Jan. 23, 1984), is unfounded.

Lame involved an FOIA request by an investigative reporter, who planned to write a book on the "new" FBI (654 F.2d at 919), for a large number of interview forms used by the FBI to record information that might later be used in two criminal prosecutions. In the district court the FBI produced in camera random samplings of the interview forms sufficient to satisfy the court that Exemptions 7(C) and (D) applied to the entire lot, inasmuch as assurances, either express or implied, had been given all interviewees that there would be no indiscriminate release of their identities (654 F.2d at 920). The court of appeals agreed with the FBI that Vaughn affidavit procedures could not be employed, since "[o]nce the government admitted to possessing interview forms with any of these informants, it would be revealing the very information it claimed to be exempt -- the identities of confidential sources" (id. at 927). Nonetheless, the court of appeals remanded to the district court to determine in camera, with respect to each individual document, whether disclosure would be an unwarranted invasion of personal privacy or whether there was an express or implied assurance of

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15/ Senator Hart stated (120 Cong. Rec. 17040):

> If informants' anonymity -- whether paid informers or citizen volunteers -- would be threatened, there would be no disclosure;
>
> * * * * *
>
> If disclosure is an unwarranted invasion of privacy, there would be no disclosure * * *;
>
> If in any other way the Bureau's ability to conduct such investigation were threatened, there would be no disclosure.

confidentiality (id. at 928-929). Although we disagree with the result in Lame, it is clearly distinguishable from this case, because disclosure of materials to a reporter investigating changes in agency practices falls easily within the "public interest" in disclosure protected by the FOIA. We therefore agree that a balancing of interests under Exemption 7(C) was required. 16/ But nothing in Lame suggests that an FOIA requester pursuing information for purely private purposes should be able to require an agency to confirm or deny the existence of sensitive files on nonconsenting named individuals.

Similarly, in Diamond, the requester, a professor, was found by the district court to have a "scholarly interest" in the documents at issue, which related to the McCarthy era. The court also found that there existed a genuine public interest in "the effect and extent of FBI intrusions into the institutions of our society" during that period. 707 F.2d at 77. The FBI produced documents responsive to his request and the litigated issues were the appropriateness of specific redactions and withholdings. Ibid. There is no inconsistency whatsoever between that case and the instant case.

The other court of appeals decisions cited by petitioner (Pet. 10) plainly are not in conflict with the instant case because, as petitioner acknowledges, they do not involve third party requests. As the court below recognized, third party requests differ materially from first party requests. With first

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16/ We disagree with the Lame court that confidentiality of a source cannot be implied from the circumstances or demonstrated through affidavit or a random sampling. In this respect, Lame was implicitly overruled by Conoco v. Department of Justice, 687 F.2d 724 (3d Cir. 1982). There the court held (687 F.2d at 730):

> [T]here is no requirement that the agency make a showing that there is a promise or an agreement on the agency's part to hold in confidence the information provided by the confidential source.

Accord, Londrigan v. FBI, 722 F.2d 840, 844-845 (D.C. Cir. 1983); Miller v. Bell, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

party requests, references to other persons may be deleted from released records to protect those persons' privacy (Pet. App. A4). The same is generally true of most subject matter requests. In contrast, because third party requests seek information about another person filed under that person's name, the name cannot be deleted to protect that person's privacy (ibid.). This means that specific claims of exemption -- such as that material has been withheld to protect the confidentiality of a source -- cannot be asserted without jeopardizing the third party's safety and the FBI's ability to conduct investigations. Such considerations justify treating third party requests differently.

Accordingly, the FBI's policy of refusing to confirm or deny the existence of files is not applied to (and Vaughn affidavits therefore may be required for) other categories of request. These include third party requests in which there is a legitimate public interest in disclosure (as in Diamond), consensual third party requests, and all manner of subject matter requests. The feature that all these categories have in common is that documents may be redacted as necessary to protect the privacy of persons named therein. That is not possible for documents filed under the persons' names.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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